what's NEWS

Spring 2003

New Format

Welcome to the reformatted *What's News* newsletter. Although budgetary restraints have caused us to look at other ways to deliver the news to you, we feel that doing it electronically will bring some special benefits. Usually, an editor has to write to fit a certain space – in the case of *What's News,* it was either a 4-page, 6-page or 8-page edition. The electronic format eliminates the problem of "writing to fit." Additionally, this format will enable us to send out articles of interest more frequently than quarterly. Let us know what you think. As always, we're looking for your input on topics and suggestions for improvement.

– *The Editor*

U.S. Supreme Court Issues Landmark FMLA Decision

- On March 19, 2002, a divided U.S. Supreme Court issued a landmark FMLA decision in *Ragsdale v. Wolverine Worldwide, Inc.*, 218 F.3d 933. The 5-4 decision, the first case the Court has reviewed under the federal Family and Medical Leave Act (FMLA), is favorable to employers. It invalidates a U.S. Department of Labor (DOL) regulation that penalized employers by requiring them to provide an additional 12 weeks of leave to employees who had not received the required employer notice that the leave would be counted as part of the annual FMLA entitlement. **Full Story >**

DOL Announces Plans to Revise FMLA Regulations

- The U.S. Department of Labor has announced plans to revise the Family and Medical Leave Act regulations in line with the U.S. Supreme Court's decision in the *Ragsdale* case invalidating the regulation that stipulates that until an employer designates an employee's leave as FMLA-qualifying, the leave does not count against the employee's 12-week FMLA entitlement. **Full Story >**

Summary of FMLA Cases Impacting State

- In addition to the U.S. Supreme Court *Ragsdale* decision, there are four other FMLA cases – U.S. District Court (CT) and 2nd Circuit Court of Appeals – that impact Connecticut employees and state agencies. **Full Story >**

U.S. Supreme Court Upholds EEOC's Threat-to-Self Defense

- In a long-awaited ruling, the U.S. Supreme Court has unanimously upheld regulations issued by the Equal Employment Opportunity Commission (EEOC) holding that an employer may refuse to place a disabled worker in a position that may pose a risk of harm to that individual – even if the individual is willing to take the risk. [*Chevron U.S.A. Inc. v. Echazabal*, 226 F.3d 1063] **Full Story >**

EEOC Reports Charge Filings up for 2002

- Racial discrimination continues to head the list of the most frequent charges filed with the U. S. Equal Employment Opportunity Commission (EEOC), according to recently released statistics for fiscal year 2002 (which ended September 30). Of the 84,442 total charge filings with the EEOC in FY 2002 (up 4.5%), the biggest increases from the prior year were in allegations of *religious discrimination* (up 21%), *age bias* (up 14.5%), and *national origin discrimination* (up 12.7%). **Full Story >**

OP&A Expands Efforts - The Office of Protection and Advocacy published a new manual for families and students with disabilities, "Special Education is Not a Place." This 80-page guide includes important special education information, as well as a listing of the many disability resources available to individuals and families in Connecticut. **Full Story >**

CT Wins Federal Award for Programs for Youths with Disabilities -

The U.S. Department of Labor awarded the State of Connecticut, through the Department of Administrative Services, a two-year, $250,000 grant to promote and implement local High School/High Tech programs for youths with disabilities. Connecticut is one of only two states in the country to win this sought after award. **Full Story >**

Expanded Workplace Protection for Crime Victims - A reminder that a new state law, effective October 1, 2002, expanded the protections for crime victims and gave individuals with erased criminal records greater employment protection. All agencies must comply. **Full Story >**

You're the Judge…

A nurse consultant for a state health department, who described herself as a born-again Christian, discussed religion while on a home visit to a same-sex couple. One man was in the end stages of AIDS. The men filed complaints with the state's human rights agency, and ultimately a lawsuit, alleging discrimination on the basis of sexual orientation in the provision of state services. Their case was dismissed. The nurse was suspended for four weeks without pay, and filed suit claiming a violation of her First Amendment free speech rights and her right to be treated equally under the Fourteenth Amendment. *Does she win her case?* Case **and** Decision >

In Brief… **Full Stories >**

- ***EEOC Offers Fact Sheets about Workplace Rights of Muslims, South Asians***
- ***U.S. Labor Department Launches On-Line Reference Service***
- ***U.S. Labor Department Offers Spanish-language FMLA poster***
- ***EEOC Issues New ADA Handbook***
- ***OSHA Offers Bi-monthly Quick Takes E-mail***

Trends **Full Stories >**

- ***U.S. Getting Healthier, CT Among Healthiest States***
- ***Workplace Injuries and Illnesses Drop***

Questions & Answers – FMLA Full Answers >

What's New(s) is published quarterly by the Department of Administrative Services Business Advisory Group, 165 Capitol Avenue, Hartford, CT 06106. Its purpose is to give basic information to state managers, supervisors, HR personnel and affirmative action professionals on legal issues that affect employment. It is not intended to be a substitute for individual professional legal advice on a specific case. Individual problems should be reviewed by the agency's staff attorney or the Attorney General's office.

Comments are welcome and should be addressed to the editor at:
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High Court Hears First FMLA Case – Strikes Down Regulation re: Notice

On March 19, 2002, a divided U.S. Supreme Court issued a landmark FMLA decision in Ragsdale v. Wolverine Worldwide, Inc.*,* 535 U.S. 81 (2002). *The 5-4 decision, the first case the Court has reviewed under the federal Family and Medical Leave Act, is favorable to employers. It invalidates a U.S. Department of Labor (DOL) regulation that penalized employers by requiring them to provide an additional 12 weeks of leave to employees who had not received the required employer notice that the leave would be counted as part of the annual FMLA entitlement.*

Background – FMLA Notice Requirements

Under the federal FMLA regulations, there are three parts to an employer's responsibility regarding notice:

(1) Employers are required to prominently post a notice (in a language in which the employees are literate) that explains the FMLA's provisions and provides information concerning the procedures for filing complaints of violations of the Act with the U.S. Department of Labor's (DOL) Wage and Hour Division. Employers with multiple work sites must post notice at each site.

(2) Employers that have a written employee handbook describing its policies regarding leave, wages, attendance, etc. must incorporate in the handbook information concerning FMLA entitlements and employee obligations under the federal FMLA.

(3) Whether or not an agency has a written policy, manual or handbook describing employee benefits and leave provisions, the employer must provide written guidance to an employee regarding federal FMLA rights and obligations whenever an employee requests FMLA leave. There are several very specific points that an employer must cover. (*These are outlined in the FMLA Manual, which has been provided to all state agencies by DAS.*)

In additional to the above requirements regarding notice, the regulations state that, "In all circumstances, it is the employer's responsibility to designate leave, paid or unpaid, as FMLA-qualifying, and to give notice of the designation to the employee…" *[29 C.F.R. Sec. 825.208(a)]* Further, "If an employee takes paid or unpaid leave and the employer does not designate the leave as FMLA leave, the leave taken does not count against an employee's FMLA entitlement." *[29 C.F.R. Sec. 825.700(a)]*

Case Facts

Tracy Ragsdale began working at Wolverine, an Arkansas shoe factory, in 1995. The following year she was diagnosed with Hodgkin's disease. Her prescribed treatment involved surgery and months of radiation therapy. Though unable to work during this time, she was eligible for seven months of unpaid sick leave under the company's leave plan. Ragsdale requested and received a one-month leave of absence on February 21, 1996, and asked for a 30-day extension at the end of each of the seven months that followed. Wolverine granted the first six requests, and Ragsdale missed 30 consecutive weeks of work. Her position with the company was held open throughout. The company maintained her health benefits and paid her premiums during the first six months of her absence. However, Wolverine did not notify her that 12 weeks of the 30-week absence would simultaneously count as her FMLA leave.

In September, when Ragsdale sought a seventh 30-day extension, Wolverine advised her that she had exhausted her seven months under the company plan. Her condition persisted, so she requested more leave or permission to work on a part-time basis. Wolverine refused and terminated her when she did not come back to work.

Ragsdale filed suit in district court, relying on the Department of Labor regulation that provides that if an employee takes medical leave "and the employer does not designate the leave as FMLA leave, the leave taken does not count against an employee's FMLA entitlement." [*29 C.F.R. Sec. 825.700(a)*] The required designation had not been made, so Ragsdale argued that her 30 weeks of leave did not count

against [her] FMLA entitlement." According to Ragsdale, when she was denied additional leave and terminated after 30 weeks, the statute guaranteed her 12 more weeks. She sought reinstatement, back pay and other relief.

Although Wolverine conceded it had not given Ragsdale specific notice that part of her absence would count as FMLA leave, it maintained that it had complied with the statute by granting her 30 weeks of leave – more than twice what the FMLA required. The district court granted summary judgment to Wolverine. In its view, the Department of Labor's (DOL) regulation was in conflict with the Act passed by Congress and invalid because it, in effect, required the company to grant Ragsdale more than 12 weeks of FMLA leave in one year. The 8th Circuit Court of Appeals agreed. Ragsdale subsequently appealed to the U.S. Supreme Court, which affirmed the lower court.

Analysis

This case centered on the provision in the regulations that stipulate that until an employer designates an employee's leave as FMLA-qualifying, the employee's time off may not be counted against his/her 12-week entitlement [*29 C.F.R. Sec. 825.700(a)*]. The provision punishes an employer's failure to provide timely notice of the FMLA designation by denying the employer any credit for leave granted before the notice. In a worst-case scenario, the net effect could be to provide an employee with twice as much leave as the FMLA permits.

According to the Supreme Court, this penalty is unconnected to any prejudice or harm an employee might suffer from an employer's lapse. In other words, if the employee took an undesignated absence of 12 weeks or more, the regulation would always give him/her the right to 12 *more* weeks of leave in that particular 12-month period. The fact that the employee would have acted in the same manner if notice had been given is irrelevant to the U.S. DOL, which would require the employer to grant the additional 12 weeks *even if the employee had full knowledge of the FMLA and expected the absence to count against the 12-week entitlement*.

The Court found this "categorical penalty" to be incompatible with the original Act passed by Congress in 1993. According to the original Act, to prevail in a cause of action an employee must prove two things: (1) that the employer interfered with or denied the employee's exercise of FMLA rights and (2) that the employee had been prejudiced by this interference or denial. The challenged DOL regulation ignores the requirement that the employee prove some harm as a result of the employer's violation, and imposes a penalty even if the employee was not harmed by this lack of notice. The Court said that the regulation is "contrary to the Act and beyond the Secretary of Labor's authority."

The Court noted that another reason for finding the penalty put forth in the DOL's regulation inconsistent with Congress' intent is evident from the fact that the Act itself only contains a simple notice provision: Employers are directed to post a general notice informing employees of their FMLA rights. This provision sets out its own penalty for noncompliance: Any employer that willfully violated this section may be assessed "a civil monetary penalty not to exceed $100 for each separate offense." The DOL's regulation, in contrast, establishes a much heavier sanction, by requiring the employer to give the employee as much as 12 more weeks off.

"Whatever the bounds of the Secretary's [of Labor] discretion on this matter," the Court concluded, "they were exceeded here."

Bottom Line

Although the Court struck down that the DOL regulation that penalized employers for failure to give individual notice, it stopped short of saying that employers never have to give workers notice about leave, "…we do not decide whether the notice and designation requirements are themselves valid or whether other means of enforcing them might be consistent with the statute." In other words, the Court's decision was narrow. The Court left several questions remaining.

It is unclear, for example, how the Court may address the individualized notice requirement in other circumstances. In *Ragsdale*, the penalty for a lack of individualized notice – 12 additional weeks of leave

beyond the 30 weeks given under the employer's generous leave policy – was disproportionate to the violation. Although agencies can breathe a sigh of relief from the fact that someone who takes 12 weeks of leave will not automatically get another 12 weeks just because he/she didn't get a piece of paper, the case may be decided differently if the employee were harmed or prejudiced by lack of notice. Agencies should still provide the form of notice required by the regulations stating the requested leave is being counted as FMLA leave and describing whether it runs concurrently with any other leave entitlement.
Secondly, although the Court struck down the DOL's current remedial provisions (i.e., undesignated leave does not count against an employee's 12-week FMLA entitlement) and suggested that (1) the remedy must be determined on a case-by-case basis and (2) the employee must show harm from the employer's failure to provide notice, the ruling leaves employers unaware of what, if any, penalties the courts, including the U.S. Supreme Court, would approve in future cases.

Nor did the Court provide examples of how lack of notice might adversely affect an employee or impair his/her FMLA rights. Some considerations could include: Was the employee totally disabled during the leave period? Would the medical condition have permitted work on an intermittent basis? Was there any other course of treatment or option available that would have permitted the employee either to return to work sooner or delay the leave until some future date? Does the employer provide more generous leave than the FMLA?

Perhaps the biggest question remaining is the DOL regulation that states that the employer must designate leave as FMLA leave within two business days of becoming aware of the reason for leave *[29 C.F.R. Sec. 825.301(b)(2)]*. This issue was not specifically addressed in *Ragsdale*, but the decision would seem to call this regulation in question. The Court offered no specific guidance on how long after the leave begins can the employer designate it as FMLA leave – whether initial or re-designation of FMLA leave must occur during the leave or even after the leave has ended. Therefore, agencies should continue to be as timely as possible in noticing their employees who have been absent for more than three days ("absence plus treatment") or employees who have a multiple conditions that if left untreated would likely result in an absence of more than three days.

This is latest in a string of victories for employers in cases involving laws protecting injured or ill workers. In this decision, the Supreme Court brings into alignment the FMLA piece of the interplay among the disability management laws that require employers to assess employee requests for leave and other accommodations for covered illnesses, injuries, and "disabilities" on an individualized case-by-case basis. With this decision, the FMLA is now more akin to the ADA, which sets out general principles that employers are left to apply to individual cases. While that might be better than an "all or noting rule" that always worked against employers who fail to give the proper notice, it creates a need for more analysis and more case-by-case assessment.

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DOL Announces Plans to Revise FMLA Regulations

The U.S. Department of Labor (DOL) has announced plans to revise the Family and Medical Leave regulations in line with the U.S. Supreme Court's recent decision [*Ragsdale v. Wolverine World Wide Inc.,* 535 U.S. 81 (2002)] invalidating the regulation that stipulates that until an employer designates an employee's leave as FMLA-qualifying, the leave does not count against the employee's 12-week FMLA entitlement.

The DOL was expected to offer substitute language in the form of a notice of proposed rule-making (NPRM) in January 2003, with the public comment period set to end in March. Any questions regarding the DOL's NPRM may be addressed to Tammy D. McCutchen, Administrator, Wage and House Division, Department of Labor, Employment Standards Administration, 200 Constitution Ave., N.W., FP Building Room S3502, Washington, D.C.; [phone (202) 693-0051; fax (202) 693-1432.]

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Summary of FMLA Cases Impacting State

In addition to the U.S. Supreme Court *Ragsdale* decision, following are four U.S. District Court (CT) and 2nd Circuit Court of Appeals cases that impact Connecticut employees and state agencies:

- *Hale v. Mann* [U.S. 2nd Circuit] – state immune against claim if leave for one's own serious illness.
- *Serafin v. CT DMHAS* [U.S. District Court (CT)] – state not immune if leave to care for sick family member.
- *Sanghvi v. Frendel* [U.S. 2nd Circuit] – employer entitled to adequate notice.
- *Woodford v. Community Action* [U.S. 2nd Circuit] – employer can challenge employee's eligibility for leave once employer has given notice that employee is eligible for leave.

Note: *The summaries of cases deal only with claims related to FMLA and not to any other claims made.*

Hale v. Mann [*U.S. 2nd Circuit, May 2000*] – Hale was hired as director of a residential youth facility operated by the New York Office of Children and Family Services (OCFS). According to Hale, the conditions at the facility were in disarray when he took over; the staff did not feel safe and assaults on the residents and staff were common. After he assumed his duties, funding decreased and the residents became more violent, prompting increased security concerns. The OCFS began to alter the procedures at the facility. Shortly thereafter, an unannounced inspection by OCFS found numerous problems. Additionally, a fight at the facility received negative attention in the press. Hale was asked to investigate and write a report, a task he delegated to a subordinate who conducted the investigation and wrote a report concluding that OCFS's policy regarding the use of the wing was to blame.

After Hale forwarded a copy of the report to the Commission on Correction, he took sick leave for job-related stress. The absence was considered FMLA leave. Two weeks into Hale's leave, the OCFS conducted another surprise inspection and found conditions unimproved. Hale was terminated as facility director during his third week of FMLA. When Hale complained that this would be illegal under the FMLA, the date was changed to the end of the 12-week period. Because he held a tenured status with OCFS, his termination resulted in a demotion, and he subsequently was reassigned to an inferior job, with a lower salary and fewer responsibilities, in a facility far from his home.

In his lawsuit, Hale alleged that the OCFS violated his rights under the FMLA by firing him in retaliation for taking leave. The lower court found that the true reason for the firing was Hale's poor performance and concluded that the FMLA conferred no greater rights to an employee on leave than it would to an employee at work. On appeal, the 2nd Circuit ruled that the state was immune from suit under the 11th Amendment, or alternatively, that Hale failed to provide any evidence of retaliation.

Comment: This case hinged on the 11th Amendment. A brief summary: 11th Amendment immunity provides that states cannot be sued in federal court for violations of federal law. This immunity is not absolute and Congress can abrogate that immunity if two conditions are met: (1) Congress clearly states its intent to abrogate state immunity; and (2) Congress acts pursuant to a valid exercise of its power. The Court quickly found that Congress intended to abrogate state immunity. But, the court concluded that Congress did not act pursuant to a valid exercise of its power.

It is important to note that the court in *Hale* made a special point to limit their decision to FMLA leave taken for <u>one's own</u> serious health condition. It left open the question that the U.S. District Court for Connecticut examined four months later in *Serafin v. CT Department of Mental Health and Addiction Services*, specifically — What if leave is taken for another FMLA qualifying reason, e.g., child care following the birth or adoption of a child, leave to care for a parent, spouse or child with a serious health condition?

Would the states enjoy the same protection from immunity from suit or would an individual be permitted to file a claim against the state?

Note: Even though Hale precludes an individual from filing suit against a state, the Department of Labor if it chose to, would be able to sue the state on behalf on an employee.

Serafin v. State of CT Department of Mental Health and Addiction Services

[*U.S. District Court (CT), September 2000*] – Serafin alleged that she was terminated from her position as a psychiatric nurse on the grounds of insubordination, misconduct, and unsatisfactory attendance. She alleged that basing her termination on her absences—even in part—violated the FMLA. Her absences were caused by a need to care for her sick mother.

Comment: In contrast to the FMLA provision at issue in *Hale*, which dealt with leave for one's own serious health condition, the provision at issue in this case dealt with leave for an employee who needed to care for a seriously ill parent (spouse or child). Recognizing that an FMLA claim based on a family member's serious health condition is different from a claim based on one's own health condition, the court concluded that Serafin's claim was not barred by the 11th Amendment.

Although decided after *Hale v. Mann*, this is a lower court decision (District of Connecticut, covering Connecticut only) as opposed to the 2nd Circuit decision in *Hale* (covering Connecticut, New York and Vermont). The controlling case law at the moment for Connecticut state government agencies is that the state's immunity is not abrogated when an employee takes leave for his/her own serious illness, but it is abrogated when the leave is to care for a family member (parent, child, spouse) with a serious health condition. In the former case, the state employee cannot sue the state in federal court for an FMLA violation; in the later case, the employee may.

Sandhvi v. Frendel

[U.S. 2nd Circuit, December 2000] – Sanghvi worked as a probationary senior attorney in a unit of the New York State Workers' Compensation Board (WCB) for approximately one year, when he resigned under pressure from his supervisors. Six months after he was hired, Sanghvi sent a letter to Frendel, requesting two months of leave to visit his father in India because his mother had recently died. He labeled the leave as "vacation." The letter failed to indicate that his father suffered from any medical condition that would qualify as a "serious health condition" under the FMLA. His request was denied. The lower court held that Sanghvi's claim under the FMLA was barred against the WCB, an arm of the State of New York, by the 11th Amendment. In the alternative, the district court held that even if the claim were not barred, Sanghvi failed to establish that he gave proper notice under the FMLA that his request for leave was to care for his ailing father.

The 2nd Circuit, in affirming the district court's decision, chose not to examine the question of whether Congress abrogated the state's 11th amendment immunity from suit in passing the FMLA. Instead, the court found that the FMLA required employees to give employers sufficient information to make clear that the employee's reason for seeking leave qualifies under FMLA—in this case, that Sanghvi wanted to care for a parent with a "serious health condition." Because Sanghvi failed to inform Frendel that his father suffered from a serious health condition, the court found that the notice was inadequate and did not apprise the WCB of any need to inquire further into the possibility that the requested leave would qualify under the FMLA.

Comment: Although not a significant case, it does underscore the employer's right to receive adequate notice of the reason for leave when an employee wishes to have the leave count towards his/her federal FMLA entitlement. The employer is not expected to be clairvoyant. The court acknowledged that even though "an employee need not expressly assert rights under the FMLA or mention the FMLA by name," the employee must provide the employer with enough information to make clear that the employee's reason for seeking leave qualifies under the FMLA.

It is interesting to note that the 2nd Circuit declined to review the states' immunity issue, leaving open, as they had done in *Hale v. Mann*, the issue of whether the immunity would be abrogated if the leave were to care for a family member with a serious health condition instead of one's own serious health condition (as it was in *Hale*). Although *Serafin v. CT DMHAS* did examine this issue, finding that in this situation the immunity would be abrogated, *Serafin* was a lower court decision.

Woodford v. Community Action of Greene County, Inc. [*U.S. 2nd Circuit, October 2001*] – Iva Woodford worked for Community Action of Greene County, Inc. (CAGC) for approximately 12 years, 10 of which she spent as the director of its Head Start Program. According to her time sheets, during her last year with CAGC, Woodford only worked 816.5 hours. This was due in part to a suspension she received for disciplinary reasons. During that same period, she complained to CAGC's Board of Directors about harassment by CAGC's Executive Director. When Woodford sought to take leave under the FMLA because she suffered from stress, anxiety and depression arising from the alleged harassment, and from the Board's failure to respond to her complaints about the harassment, CAGC provided her with an "Employer Response to Employee Request for Family or Medical Leave" form, which indicated that she was an employee eligible for leave under the FMLA.

The form CAGC provided also indicated that it had determined that Woodford was a "key employee" and that she would not be reinstated to her former position at the end of her leave because doing so would "cause substantial and grievous economic harm" to CAGC. Additionally, CAGC sent a letter informing her again that she was a key employee, ineligible for reinstatement unless she returned to work within two weeks. Woodford promised to return by that date, but later postponed her return by five weeks. At the end of the initial two-week period (when Woodford was to have returned), CAGC hired an interim Head Start Program Director. CAGC notified Woodford that it would not reinstate her. She filed suit claiming that the defendants' denial of reinstatement violated the FMLA. The district court granted summary judgment for CAGC on the ground that the Act did not cover Woodford because her time sheets showed that she had not worked a minimum of 1,250 hours in the last 12 months. The court also held that CAGC's notice to Woodford that it would deny her reinstatement complied with FMLA regulations.

On appeal, Woodford challenged dismissal of her FMLA claim, arguing that CAGC could not contest her eligibility under the Act because CAGC itself had provided her notice of eligibility in accordance with the regulations. C.F.R. Sec. 825.110(d) prohibits an employer from challenging an employee's eligibility for leave under the FMLA once the employer has given notice to the employee that she is eligible for such leave. She further argues that, assuming her eligibility, CAGC was not entitled to deny her restoration based on her status as a key employee. The 2nd Circuit Court affirmed the district court's decision for CAGC.

Comment: This court sites various other court decisions that have struck down C.F.R. Sec. 825.110(d). In general, the courts held this regulation to be invalid. The 2nd Circuit found that Congressional intent was clear concerning which employees are eligible under the FMLA: "The statute straightforwardly defines an 'eligible employee' as 'an employee who has been employed…for a least 12 months by the employer with respect to whom leave is requested,' and who must have 'been employed…for at least 1,250 hours of service with such employer during the previous 12-month period.'" [*29 U.S.C. Sec. 2611(2)(A)]* Because the regulation in question would permit, under certain circumstances, employees who have not worked the statutorily defined minimum required hours to become eligible for FMLA leave, "it contradicts the expressed intent of Congress and therefore is invalid."

The court held that the regulation, as currently written, was too broad. According to the 2nd Circuit, "We cannot enforce the portion of the regulation currently before us." It "exceeds agency rulemaking

powers by making eligible under the FMLA employees who do not meet the statute's clear eligibility requirements."

In spite of the fact that the 2nd Circuit found that (1) Congress clearly defined employee eligibility for FMLA and (2) the regulation was overly broad, the court was sympathetic to a dissenting view of the regulation from a court in another jurisdiction, which found the requirement (to promptly notify an employee of his/her eligibility or be estopped from denying eligibility later) reasonable. That court reasoned that an employee would not be able to balance the demands of the workplace with the needs of the family—the express purpose of FMLA—without knowing if leave was granted. The 2nd Circuit commented that even in the absence of a formal regulation, the doctrine of equitable estoppel may apply where an employee relied to his/her detriment upon the assurance of their employer that they qualified for FMLA leave.

The court did not take up Woodford's other argument that she was improperly denied restoration of her old position on the grounds that she was a "key employee" because this argument rested on the assumption that she was eligible for FMLA leave, which she was not.

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U.S. Supreme Court Upholds EEOC's Threat-to-Self Defense

In a long-awaited ruling, the U.S. Supreme Court has unanimously upheld regulations issued by the Equal Employment Opportunity Commission (EEOC) holding that an employer may refuse to place a disabled worker in a position that may pose a risk of harm to that individual – even if the individual is willing to take the risk. [Chevron U.S.A. Inc. v. Echazabal, 226 F.3d 1063]

Case Facts

Beginning in 1972, Mario Echazabal worked for independent contractors at an oil refinery owned by Chevron. Twice he applied for a job directly with Chevron, which offered to hire him if he could pass the company's physical examination. Each time, the exam showed liver abnormality or damage, the cause eventually being identified as Hepatitis C, which Chevron's doctors said would be aggravated by continued exposure to toxins at Chevron's refinery. In each instance, the company withdrew the offer, and the second time it asked the contractor employing Echazabal either to reassign him to a job without exposure to harmful chemicals or to remove him from the refinery altogether. The contractor laid him off in early 1996.

Echazabal filed suit, claiming that Chevron violated the Americans with Disabilities Act (ADA) in refusing to hire him, or even to let him continue working in the plant, because of a disability—his liver condition. Chevron defended its actions as authorized by a regulation promulgated by the EEOC permitting employment decisions based upon whether a worker's disability on the job poses a direct threat to the worker's own health. Echazabal maintained that the regulation was invalid because it went beyond the ADA's statement that employers do not have to hire individuals who pose a direct threat to the health or safety of other individuals in the workplace.

Chevron was granted summary judgment by the district court, and the suit was dismissed. On appeal, the 9th Circuit Court of Appeals raised the issue of whether the EEOC regulation improperly permitted employers to consider whether a direct threat was posed to the disabled individual himself when the text of the ADA seemed to authorize consideration only of whether there was a threat to co-workers. The circuit court reversed the district court's summary judgment and ruled that the EEOC exceeded it authority based upon the text of the ADA, which it felt limited employers to considering whether a direct threat was posed to "others." The majority opinion reasoned that by specifying only threats to other individuals in the workplace, the statute makes it clear that threats to other persons including the disabled individual himself are not included within the scope of the direct threat defense and it indicated that any such regulation would unreasonable conflict with congressional policy against paternalism in the workplace. In other words, the court took the position that while employers could make decisions meant to protect other workers from a threat posed by a disabled worker, it was up to the disabled individual to decide whether he or she needed protection from a threat posed by his or her own disability.

This decision was in conflict with ones from the 11th and 7th Circuits. The U.S. Supreme Court agreed to hear this case to resolve the disagreement among the circuits.

Analysis

The U.S. Supreme Court rejected the 9th Circuit's holding that the EEOC overstepped its bounds by implementing a regulation permitting employers to consider the danger to a disabled individual in the workplace posed by his own medical condition. The Court found "three strikes" against the circuit court's interpretation:

1. It rejected the 9th Circuit's interpretation that because the ADA stated that permissible qualification standards "may include a requirement that an individual shall not pose a direct

threat to the health or safety of other individuals in the workplace," Congress meant to exclude the danger posed to the disabled employee, himself, as a permissible consideration for employers.

2. There was nothing in the text of the ADA or the legislative history to indicate that Congress intended to deliberately omit the safety of the disabled individual as a proper consideration for employers.
3. The Court found that the 9th Circuit's strict interpretation of the ADA—only permitting employers to consider the danger to "others in the workplace"—led to the illogical conclusion that an employer would not be allowed to consider the safety of anyone other than potential co-workers. The Court noted that under the circuit court's interpretation, an employer would not be able to refuse to permit Typhoid Mary from working in a meat-packing plant, regardless of the threat she posed to persons outside the workplace, as long as there was a reasonable accommodation that would permit Mary's coworkers from any dangers associated with her presence.

The Court, however, cautioned that an employer's ability to make employment decisions based upon whether a disabled individual posed a threat to himself/herself or others was not meant to provide a cover for covert discrimination. Instead, an employer's decision based upon a safety risk posed by a disabled individual must be based on a reasonable medical judgment that relies on the most current medical knowledge and/or the best available objective evidence and upon an expressly "individualized assessment of the individual's present ability to safely perform the essential functions of the job reached after considering, among other things, the imminence of the risk and the severity of the harm portended."

The Supreme Court remanded the case to the 9th Circuit to determine whether Chrevron's determination that Echazabal's presence in the workplace posed a danger to himself was based upon a "reasonable medical judgment" or whether the company misconstrued the medical evidence.

Bottom Line

Chevron is a major victory for employers, who argued they could be forced to hire people with grave illnesses or debilitations, and then face possible lawsuits if those workers were further harmed or died on the job. This is the third ruling issued under the ADA by the high court last year – all of which are considered victories for employers.

Under the ADA, it's clear that employers can refuse to hire a disabled applicant for a job where he/she would pose a direct threat to *others*. The EEOC regulation went further, saying that an employer could reject a disabled applicant if the job would pose a direct threat to *himself/herself* but not to others.

This ruling lets an employer use the "direct threat to self" defense to block a disabled person who applies for a job that threatens his own safety. But it doesn't give an employer *carte blanche* to claim unilaterally that a disabled employee can't perform a job for health reasons. "Direct threat" is an affirmative defense to liability for which employers carry the burden of proof. The Court expressly declined to say how acute the threat to oneself must be, leaving those determinations to the trial courts, at least in the first instance. Agencies seeking to defend decisions based on the "threat to self" must have obtained a "reasonable medical judgment" founded on competent medical opinions. Each person's condition and job still must be judged on a case-by-case basis.

To be fully confident in a decision to deny a job to a disabled individual because of its potential health hazards, agencies must (a) rely on the latest medical guidelines and medical advice to determine the likelihood of personal injury risked in a job and (b) conduct an individualized assessment of the individual's ability to safely perform the essential job functions while taking into account the imminence of the risk and the severity of the potential harm.

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EEOC Reports Charge Filings up for 2002

Racial discrimination continues to head the list of the most frequent charges filed with the U. S. Equal Employment Opportunity Commission (EEOC), according to recently released statistics for fiscal year 2002 (which ended September 30). Of the 84,442 total charge filings with the EEOC in FY 2002 (up 4.5%), the biggest increases from the prior year were in allegations of *religious discrimination* (up 21%), *age bias* (up 14.5%), and *national origin discrimination* (up 12.7%). The increase in charges of religious and national origin discrimination can be explained in part by the September 11-related workplace backlash against people who are, or are perceived to be, Muslims, Arabs, South Asians and Sikhs. While the charges of age bias can be attributed to the on-going downsizings in the private sector where older employees may be disproportionately affected.

Ten-year trends show a somewhat different picture. One of the fastest developing and most far-reaching causes of action against employers today is *retaliation*. It is currently the third most frequent type of discrimination complaint lodged by employees with the EEOC. Retaliation complaints lodged the biggest percentage increase between 1992 and 2002 – up 105.2%. Agencies should be aware that even if an underlying claim of discrimination fails, the employee might prevail on a retaliation charge. Experts say that these claims generally are easier to prove and result in larger damage awards than other discrimination claims.

Though smaller in absolute numbers, charges of religious discrimination over the same ten-year period were up 85.3%. These figures have shown a steady increase. In 1992, the number of complaints filed in this category was 1,388; in I995 the number was 1,581; in 1998, it was 1,786; in 2001, 2,127.

On the other hand, age discrimination over this period rose only 1.8% and Equal Pay Act violations actually showed a decrease of 2.9%.

Total charge filings for 2002:

(*Note:* Individuals may allege multiple types of discrimination in one charge filing.)

- 29,910 alleged **race discrimination** (up 3.5% from FY 2001)
- 25,536 alleged **sex/gender discrimination** (up 1.6% from FY 2001)
- 22,768 alleged **retaliation** (up 2.3% from FY 2001)
- 19,921 alleged **age discrimination** (up 14.5% from FY 2001)
- 15,964 alleged **disability discrimination** (down 2.9% from FY 2001)
- 9,046 alleged **national origin discrimination** (up 12.7% from FY 2001)
- 2,572 alleged **religious discrimination** (up 21% from FY 2001)
- 1,256 alleged **Equal Pay Act violations** (unchanged from FY 2001)

Ten-year trends:

- **Retaliation** (up 105.2%)
- **Religious discrimination** (up 85.3%)
- **National origin discrimination** (up 21.7%)
- **Sex/gender discrimination** (up 17.2%)
- **Race discrimination** charges (up 16.8%)
- **Disability discrimination** (up 4.5% over 1993, the first year the EEOC began enforcing the ADA)

- **Age discrimination** (up 1.8%)
- **Equal Pay Act violations** (down 2.9%)

The new statistics are available on the EEOC's website at www.eeoc.gov/stats/charges.html.

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OP&A Expands Efforts

The State of Connecticut Office of Protection and Advocacy has expanded its efforts to provide up-to-date information about disability rights and services to people with disabilities and families. Its Disabilities Resource Directory – a 32-page compendium of programs and services available to individuals and families in Connecticut – includes an expanded listing of supports and services, including web sites where appropriate.

OP&A has recently published a new manual for families and students with disabilities, entitled "Special Education is Not a Place." This manual is an 80-page guide that includes important special education information, we well as a listing of the many disability resources available to individuals and families in Connecticut. Other publications that were updated over the summer include self-help booklets on building accessibility, Social Security Income, Commission on Human Rights and Opportunities, accessible travel, and fair housing.

To obtain a copy of either of these publications and a complete listing of the updated OP&A books, contact Stan Kosloski, Assistant Director, at (860) 297-4304 (Voice) ; (860) 297-4380 or (800) 842-7303 (TTD) or by e-mail, stanley.kosloski@po.state.ct.us.

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Connecticut Wins Federal Award for Programs for Youths with Disabilities

The U.S. Department of Labor awarded the State of Connecticut, through the Department of Administrative Services, a two-year grant to promote and implement local High School/High Tech programs for youths with disabilities. Connecticut is one of only two states in the country to win this sought after award.

The grant will provide an opportunity for either out-of-school or in-school youth with disabilities to experience working in high-tech environments through corporate site visits, mentoring, job shadowing, after school activities, and paid summer internships. Students will then be encouraged to develop career goals and take the academic courses necessary to achieve their goals.

The $250,000 award is part of a $14.4 million in grants that will support the President's New Freedom Initiative goal to integrate Americans with disabilities into the workforce. The New Freedom Initiative is part of a nationwide effort to remove barriers to community living for people with disabilities. Today, there are more than 54 million Americans living with a disability, representing a full 20 percent of the U.S. population. Almost half of these individuals have a severe disability affecting their ability to see, hear, walk or perform other basic functions of life. In addition, there are more than 25 million family caregivers and millions more who provide aid and assistance to people with disabilities.

The New Freedom Initiative is a comprehensive plan that represents an important step in working to ensure that all Americans have the opportunity to learn and develop skills, engage in productive work, make choices about their daily lives and participate fully in community life. The initiative's goals are to:

- Increase access to assistive and universally designed technologies;
- Expand educational opportunities;
- Promote homeownership;
- Integrate Americans with disabilities into the workforce;
- Expand transportation options; and
- Promote full access to community life.

For more information on the New Freedom Initiative go to: www.hhs.gov/newfreedom/

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Expanded Workplace Protection for Crime Victims, Persons with Erased Criminal Records

A new state law, effective October 1, 2002, expanded the protections for crime victims and gave individuals with erased criminal records greater employment protection.

Public Act 02-136: *An Act Concerning Employment Protection for Crime Victims and Persons Whose Criminal Records have been Erased* bars employers from firing, penalizing, or disciplining employees who are crime victims because they attend court proceedings, participate in a police investigation of a criminal case of which the employee is a victim, or have had restraining orders or protective orders issued on their behalf. To qualify as a crime victim, the employee must have suffered direct or threatened physical, emotional, or financial harm as a result of the crime, or be an immediate family member of such a person. Agencies were informed of this change last fall in a letter from Department of Administrative Services (DAS) Deputy Commissioner Alan Mazzola. A copy of this letter can be found on the DAS website, (www.das.state.ct.us/HR/om/om_display_doc.asp?F_ID=43). DAS has revised the PDL-1, which can be found at www.das.state.ct.us/exam/default.asp. (It can be downloaded and completed in WORD or printed and completed by hand.) Please note that DAS will no longer print and distribute copies of the PLD-1 to agencies.

The Act also bars employers from (1) requiring employees or applicants to disclose the existence of arrests, criminal charges, or convictions if the records have been erased, and (2) bars employers from discharging, discriminating against, or refusing to hire someone based on the fact that the person had a prior arrest, criminal charge, or conviction, the records of which were erased. The Act requires employers to change their application forms to:

1. contain a clear and conspicuous notice that applicants are not required to disclose the existence of arrests, criminal charges, or convictions if the records have been erased.
2. state the types of records that are subject to erasure (records pertaining to a finding of delinquency, adjudication as a youthful offender, a dismissed or nolled criminal charge, a criminal charge for which a person has been found not guilty, and a conviction for which the person received an absolute pardon.
3. state that any person whose criminal records have been erased shall be deemed to have never been arrested and may so swear under oath.

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You're the Judge…

The employee works as a nurse consultant for a state health department. Her duties include supervising and surveying the provision of medical services by various Medicare agencies to home health care patients, in part by interviewing patients in their homes. The employee describes herself as a born-again Christian. While on a home visit to a same-sex couple, one of whom was in the end stages of AIDS, the nurse and the two men discussed religion. The nurse said she "experienced a strong sense of compassion for both men and a 'leading of the Holy Spirit'" to talk with them regarding salvation. After asking them about their religious beliefs, she said that "good works [are] not unto salvation," and that salvation was "confessing with the mouth that Jesus is the Son of God and believing in one's heart that God raised Him from the dead." Subsequently, one man stated he did not believe he would be punished for his homosexual lifestyle. The nurse responded, "Although God created us and loves us, He doesn't like the homosexual lifestyle." After the visit, the men filed complaints against the health department with the state's human rights agency alleging discrimination on the basis of sexual orientation in the provision of state services. They ultimately filed a lawsuit against the nurse, which was later dismissed. The nurse was suspended for four weeks without pay. The nurse filed suit claiming a violation of her First Amendment free speech rights and her right to be treated equally under the Fourteenth Amendment. *You're the judge. Does she win her case?*

See "You Decide…" below

You decide…

…for the agency. The U.S. District Court for the District of Connecticut found that the state may reasonably place restrictions on the nurse's ability to speak about religion with clients without infringing on her constitutional free speech rights. This decision was affirmed by the 2nd Circuit Court of Appeals. [*Knight v. State of Connecticut Department of Public Health,* 275 F.3d 156 (2001)] According to the court, to determine whether a state violates the First Amendment by disciplining public employees for their speech requires arriving at a balance between the interests of the employee, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in providing effective and efficient public services. If the public employee's speech does not touch on a matter of public concern, it is not entitled to First Amendment protection. If it does, the court must apply this balancing test. In this case, although the religious speech at issue touched on a matter of public concern, the court found that the state met its burden of showing that permitting religious speech when working with clients was and would continue to be disruptive, and that disruption outweighed the nurse's free speech interests. Additionally, the state raised valid Establishment Clause concerns (i.e., the state cannot set up a church, pass laws which aid religions, give preference to one religion or force belief or disbelief in any religion). Regarding the nurse's equal protection claims, there was no evidence to show that she was treated differently than other similarly situated employees, or that any decision maker acted with discriminatory purpose.

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In Brief…

EEOC Offers Fact Sheets about Workplace Rights of Muslims, South Asians – The EEOC has made available two new fact sheets, for employers and employees respectively, addressing frequently asked questions about the employment of Muslims, Arabs, South Asians and Sikhs. These materials represent EEOC's latest in a series of efforts to proactively prevent September 11-related workplace backlash against people who are, or are perceived to be, members of these communities. The fact sheets can be found at: http://www.eeoc.gov/facts/backlash-employer.html and http://www.eeoc.gov/facts/backlash-employee.html. The EEOC has also created a new category, Process Type Z, which is used to track the number and type of charges that it receives on the basis of religious or national origin discrimination relating to the events of Sept. 11.

U.S. Labor Department Launches On-Line Reference Service – Called "elaws Advisors," the service is designed to provide a new and easy-to-use reference tool to help employers and employees better understand federal labor laws. The free service offers help and information on complying with federal rules and regulations, including the Family and Medical Leave Act (FMLA), the Occupational Safety and Health Act (OSHA), and poster requirements. The site is www.dol.gov/elaws/.

U.S. Labor Department Offers Spanish-language FMLA poster – Agencies are required to prominently post a "Your Rights Under the FMLA" (WH Publication 1420) poster at each work site, where it can be seen readily by employees and applicants for employment. The notice must be provided in a language in which the employees are literate. The U.S. DOL offers a new Spanish-language poster that describes employees' rights. To download this poster, go to www.dol.gov/osbp/sbrefa/poster.

EEOC Issues New ADA Handbook – Although the target audience for the EEOC's "The Americans with Disabilities Act: A Primer for Small Business" is small employers, the handbook is in practical, reader-friendly format and contains a wealth of information for any size employer, including state and local governments. It contains examples, tips, "do's and don'ts" and covers such topics and getting medical information from employees, confidentiality, types of reasonable accommodations, safety concerns, drug and alcohol use. Employers can obtain a copy of the handbook on the web (www.eeoc.gov/ada/adahandbook.html) or in hard copy (as well as in alternate formats such as Braille, large print, audiotape or computer disk file) by calling (2020 663-4900 voice or (202) 663-4494 TTY.

OSHA Offers Bi-monthly Quick Takes E-mail

The Occupational Safety and Health Administration (OSHA) has created a bi-weekly e-news memo with information and updates from OSHA regarding safety and health in America's workplaces. The update is also a tool by which HR professionals can keep on top of what an agency, like OSHA, accomplishes in the areas of compliance, assistance, ergonomics, outreach, safety and health training grants, notices of proposed and final rulemakings, Hispanic outreach and program development, Voluntary Protection Program (VPP) updates, as well as updates on the activities of OSHA Secretary John Henshaw. To subscribe, go to www.OSHA.gov and look for the OSHA Quick Takes box.

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Trends…

U.S. Getting Healthier, CT Among Healthiest States – According to 2002 United Health Foundation State Health Rankings, there's been a 15.5 percent improvement in overall health in the United States. The non-profit organization, which conducted the study in collaboration with the American Public Health Association (APHA), based its rankings on information from the U.S. Department of Labor, the U.S. Department of Health and Human Services, and other groups, as well as on an assessment by state of personal behaviors and policy decisions by community leaders regarding the availability of resources for health, disease prevention and access to medical services. Factors such as occupational health, prevalence of smoking, high-school graduation rates, and infant mortality data were all considered. This year New Hampshire (for the 13th time) has been ranked the healthiest U.S. state. Minnesota ranked number two, followed by Massachusetts, Utah and Connecticut (5th). For the complete study, go to www.unitedhealthfoundation.org/shr/index.html and follow the prompts. To go directly to Connecticut's page, go to www.unitedhealthfoundation.org/shr2002/pdf/Connecticut.pdf.

Workplace Injuries and Illnesses Drop – According to U.S. Bureau of Labor Statistics, serious workplace injuries and injuries dropped 2.3 percent between 1999 and 2000. Truck drivers, laborers, nursing aides and orderlies, however, continued to suffer high rates of injury. The data revealed that there were 1.66 million serious injuries and illnesses in 2000. The most common cause was sprains and strains, which accounted for nearly 44 percent of the total. Carpal tunnel syndrome continued to be one of the most disabling conditions—typically keep workers off the job for about 27 days, followed by fractures (20 days away from work). For more information, click on www.bls.gov/news.release/osh2.nr0.htm.

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Questions & Answers – FMLA

Q. Does the FMLA cover common ailments such as the flu?

A. The FMLA was not meant to cover ordinary illnesses such as the flu, common cold, and earaches. However, the flu can qualify if it meets the criteria for a "serious health condition," i.e., an illness, injury, impairment, or physical or mental condition that involves the following:

a. Inpatient care (i.e., an overnight stay) in a hospital, hospice, or residential medical care facility, OR

b. Continuing treatment by a health care provider. While "continuing treatment" includes any period of incapacity due to pregnancy/prenatal care, and to chronic conditions, non-chronic conditions, permanent/long-term conditions requiring treatment, it also includes (1) a period of incapacity for three or more days and any subsequent treatment OR (2) a period of incapacity relating to the same condition, that also involves treatment two or more times by a health care provider or treatment by a health care provider on at least one occasion which results in a regimen of continuing treatment under the supervision of a health care provider.

(***Note:*** There is legislation proposed on the federal level to tighten the definition of a "serious health condition," but to date it has not passed.)

Q. Can an employee who has been using intermittent leave under the FMLA qualify for a perfect attendance bonus program?

A. Absences covered under the FMLA cannot be counted against employees under no-fault attendance policies. The law provides that the taking of FMLA leave may not result in the loss of any employment benefit accrued prior to the commencement of the leave. Thus, employees who were eligible for a perfect attendance award prior to taking FMLA leave, and maintain perfect attendance upon returning from leave, are entitled to the perfect attendance award. As long as the employee had no other absences attributed to a non-FMLA qualifying reason for leave, the result would be the same whether the employee took leave on an intermittent basis or took 12 straight weeks of leave.

Q. What is the difference between intermittent leave and reduced schedule leave?

A. Under intermittent leave, employees may take their 12-week leave entitlement in separate blocks of time due to a single qualifying illness. Reduced schedule leave reduces an employee's usual number of working hours per workweek or workday – typically going from full-time to part-time.

Q. Some employees on extended medical leaves do not want the time off to count against their 12-week FMLA entitlement. Who make this decision?

Q. Is it okay to place an employee on leave involuntarily, after the employee has refused FMLA leave?

Q. Can an employer force an employee to take leave under the FMLA?

A. These are all variations of the same question. According to the U.S. Labor Department, so long as the employee is an "eligible employee" and the reason for the absence is one of the conditions described in the statute, it is the employer's responsibility in all cases to declare the leave as FMLA. This is true even if the employee has not requested that designation, or has expressed a specific opinion or desire that his or her FMLA entitlement should not be charged with such an absence.

Q. Can an unmarried parent take FMLA leave for the birth of his/her child?

A. Both male and female parents are entitled to 12 weeks of parental leave when they have or adopt a baby. If an unmarried male requests leave for childcare, an employer may wish to ask for some kind of documentation of parenthood, such as the child's birth certificate signed by the employee.

Q. What if both parents work for the same employer but aren't married?

A. If both members of a *married* couple work for the same employer and become parents, they must share the 12-week entitlement to FMLA leave. For example, following her disability leave, if the wife takes 8 weeks to care for her child, the husband could only take 4 weeks for the same reason. No such limitation applies to an *unmarried* couple under the law. In this case, both parents could take 12 weeks of leave to care for the newborn. ***Note:*** Agencies need to remember that the federal government considers the State to be one employer; therefore, parents who work for different agencies work for the same employer.

Q. If two siblings work at the same location, and a parent gets sick, can they both take 12 weeks off to care for the parent?

A. Each sibling would have an individual entitlement to take 12 weeks of leave (provided each is considered an "eligible employee" and the parent's illness qualifies as a "serious health condition." The FMLA limitation on leave applies only to a married couple working for the same employer.

Q. Can an employee be required to return to work during an emergency situation (e.g., natural disasters, plant explosions, etc.)?

A. No. While an employer may request that an employee return from FMLA leave during an emergency situation, it cannot demand such action. There is not provision in the FMLA that would allow an employer to terminate or suspend a worker's FMLA leave under such circumstances. Also, an employer cannot act adversely toward the employee if he or she refuses to return from leave in an emergency situation. If it did, the employer would be violating the law.

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